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No. 00-1293

In The

Supreme Court of the United States

JOHN D. ASHCROFT, ATTORNEY GENERAL,

Petitioner,

v.

AMERICAN CIVIL LIBERTIES UNION, ET AL.,

Respondents.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Third Circuit

BRIEF OF AMICUS CURIAE ASSOCIATION OF NATIONAL ADVERTISERS, INC. IN SUPPORT OF RESPONDENTS

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STATEMENT OF INTEREST[1]

The Association of National Advertisers, Inc. ("ANA"), the advertising industry's oldest trade association, is the only organization exclusively dedicated to enhancing the ability of businesses to advertise on a national and regional basis. ANA's members rely on advertising to market a wide array of goods and services. As the nation's principal community of commercial speakers, ANA has long been committed to First Amendment protection of truthful commercial speech for lawful goods and services designed to permit consumers to make informed and autonomous choices in the marketplace.

ANA has appeared routinely before this Court as an amicus curiae in commercial speech cases. In *Greater New Orleans Broadcasting Association v. United States*, 527 U.S. 173 (1999), this Court cited ANA's brief for its articulation of the position that truthful, nonmisleading commercial speech should be protected by a strict scrutiny standard instead of the current *Central Hudson*[2] test.

ANA also has appeared as an amicus curiae in non-commercial speech cases before this Court, when those

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[1] No counsel for any party authored this brief in whole or in part, and no person or entity, other than the amicus curiae, its members, or its counsel, made a monetary contribution to the preparation or submission of the brief. The written consent of the parties to the filing of this brief has been filed with the Clerk of Court.

[2] *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of N.Y.*, 447 U.S. 557 (1980).

cases involved issues that might affect the rights of commercial speakers. Most pertinently, ANA appeared as an amicus in *Reno v. American Civil Liberties Union*, 521 U.S. 844 (1997) (*"ACLU I"*), which involved a challenge of the Communications Decency Act ("CDA"), the predecessor statute to the Child Online Protection Act ("COPA") that is the subject of the instant action. In its brief in *ACLU I*, ANA debunked the government's argument for a "child protection" exception to the First Amendment.

ANA submits its brief in this follow-up case to *ACLU I* for two reasons. First, ANA asks the Court to be steadfast in its defense of the constitutional right of adults to communicate with each other, notwithstanding governmental claims that adult communications should be restricted in order to protect children. Any departure from this principle could endanger the speech rights of ANA's members who market goods or services that are lawful for adults, but that may be considered inappropriate for minors. Although ANA certainly is opposed to direct targeting of children by pornographers, COPA goes well beyond that legitimate purpose and unconstitutionally restricts the First Amendment rights of adults.

Second, ANA submits this brief because COPA presents an additional, direct threat to commercial speech rights that was not present in the CDA. Unlike the CDA, COPA discriminates against speech by commercial entities. COPA restricts indecent speech on the World Wide Web ("Web") only if it is posted for "commercial purposes," not if it is posted for noncommercial purposes. ANA urges this Court to make clear in deciding this case that government may not treat commercial enterprises as

if they were second-class citizens under the First Amendment.

SUMMARY OF ARGUMENT

Congress drafted and enacted COPA in the mistaken belief that it had received advance approval for COPA's speech restrictions from this Court in *ACLU I*. More to the point, Congress misinterpreted *ACLU I* as holding that the invalidated CDA could be redeemed, in part, by making it applicable only to indecent speech communicated for "commercial purposes," and eliminating its application to indecent speech communicated for noncommercial purposes. That reading of *ACLU I*, however, cannot be squared either with the language of the decision or this Court's commercial speech jurisprudence.[3]

The Court has made plain that commercial speech may not be restricted based solely on government's misguided belief that it is of low value in the hierarchy of protected speech. To the contrary, the Court's recent decisions increasingly have raised the level of constitutional protection accorded to commercial speech. In addition, by

[3] The communications restricted by COPA include, but are not limited to, those that fall within this Court's traditional definition of commercial speech, *i.e.*, "speech that does no more than propose a commercial transaction." *See United States v. United Foods, Inc.*, 121 S. Ct. 2334, 2337 (2001). COPA also applies to speech that falls outside the category of commercial speech, such as the speech of plaintiffs herein. For purposes of this brief, however, ANA, as a trade association representing advertisers, focuses on COPA's impact on commercial speech.

crafting COPA so that it would discriminate against speech for commercial purposes, Congress created a constitutional infirmity that was not present in the CDA. More specifically, COPA violates the rule that speech restrictions must be effective in achieving the government's asserted goal, here the protection of minors from indecent materials on the Web. COPA's discriminatory restrictions cannot be effective because they have no application to the enormous amount of indecent speech published on the Web by noncommercial entities and by commercial entities located outside the United States. Thus, the government did not make COPA more constitutionally defensible when it limited it to restrict only speech for commercial purposes.

As its second line of defense, the government argues that COPA should receive reduced First Amendment scrutiny because Congress' goal was the protection of children. To the contrary, regardless of the compelling nature of the interest asserted by a government, its laws must withstand an undiluted degree of constitutional scrutiny. Moreover, when government's pursuit of an interest in protecting children simultaneously restricts the freedom of adults to communicate, this Court repeatedly has rejected the notion that adults may be reduced to reading only what is fit for children. For this additional reason, the judgment of the court of appeals should be affirmed.

ARGUMENT

I. COPA IMPERMISSIBLY DISCRIMINATES AGAINST COMMERCIAL SPEECH

A. Congress Misunderstood *ACLU I* As Approving Restrictions on Communications Made for Commercial Purposes

COPA's unconstitutional restrictions on adult communications may be the result of a misunderstanding by Congress of this Court's decision in *ACLU I*. The Court discussed in *ACLU I* the fact that the CDA applied to both commercial and noncommercial communications. Congress misconstrued that discussion as endorsing a revision to the CDA that would make it applicable only to speech for commercial purposes. Before exploring the legislative history of COPA, however, it is important to analyze the two contexts in which the *ACLU I* Court deemed it relevant that the CDA applied to both commercial and noncommercial entities. This analysis of *ACLU I* will show the illogic of the government's reading of it as an endorsement of COPA's discrimination against commercial speakers.

ACLU I first discusses the fact that the CDA applied to both commercial and noncommercial entities in the context of distinguishing *Ginsberg v. New York*, 390 U.S. 629 (1968). In *Ginsberg*, this Court upheld New York's exercise of its police power to prohibit the sale of indecent magazines to minors. In *ACLU I*, this Court distinguished *Ginsberg* on four grounds, including that the statute upheld there applied only to commercial transactions, while the CDA contained no such limitation. 521 U.S. at 865, 877. This distinction was important because it

underscored the extraordinary – and unconstitutional – breadth of the CDA. But *ACLU I* does not address at all whether different constitutional infirmities would arise if the CDA were reworked to apply only to communications for commercial purposes, as Congress did in enacting COPA.

In the second context in which *ACLU I* distinguishes between commercial and noncommercial entities, the Court found that the CDA imposed a greater burden on the speech of noncommercial entities. The CDA, like COPA, provided an affirmative defense for a speaker who had restricted access by minors to indecent materials through measures designed to verify that the visitors to that speaker's Web site were adults. The Court found these affirmative defenses to be constitutionally inadequate for noncommercial speakers because "it is not economically feasible for most noncommercial speakers to employ such verification." 521 U.S. at 881. The Court did not state or imply, however, that the CDA's affirmative defenses would have been constitutionally adequate if they applied only to commercial speakers. Thus, *ACLU I* cannot logically be read as signaling the Court's advance approval of a revision to the CDA that would eliminate its application to noncommercial speakers.

Nonetheless, the legislative history of COPA demonstrates that Congress misunderstood *ACLU I* as holding that the CDA could be fixed, in part, by making it applicable only to commercial entities. The Senate Report states that the COPA bill was introduced "in response to," and "addresses the concerns of," this Court's decision in *ACLU I*. S. Rep. No. 105-225, at 2 (1998). More specifically, the Senate Report attributes to this Court the notion that

commercial Web sites should be regulated differently from noncommercial sites. *Id.* at 11. The Report states: "By limiting the scope of the bill to only commercial activity, the bill is brought into line with the previously outlined Supreme Court discussion in [*ACLU I*] of the contrast between the CDA and the New York statute upheld in *Ginsberg v. New York*." *Id.*

The House Report shows a similar misreading of *ACLU I*. The Report states that COPA "does not prohibit non-commercial activities over the Web, or over the Internet for that matter, and thus the concerns raised by the Supreme Court [in *ACLU I*] are no longer applicable." H.R. Rep. No. 105-775, at 13 (1998). More specifically, the Report misunderstands *ACLU I* as authorizing Congress to discriminate against the speech of commercial entities because, it is assumed, such entities could afford financially the implementation of COPA's affirmative defenses. *See id.* at 13-15.

Congress' misinterpretation of *ACLU I* has now been adopted by the Attorney General. In his brief, he argues that Congress "responded directly" to *ACLU I* by drafting COPA so that it applies only to commercial entities. Pet. Br. at 51. Further, the Attorney General echoes the Senate and House Reports by claiming that COPA improves on the CDA because COPA excludes from its coverage those speakers who might not be able to afford the costs of compliance with its affirmative defenses. *Id.* at 11 (citing H.R. Rep. No. 105-775).

The government's reading of *ACLU I* strays well beyond both the language of that decision and, as discussed below, established First Amendment principles.

The instant case presents this Court with an opportunity to clarify its decision in *ACLU I*, so that neither the federal government, nor any other government, will rely on it to pass laws that impermissibly discriminate against commercial speech. "[N]ow that the [discrimination] issue is squarely presented, it behooves" the Court to "reconcile" any ambiguous language in *ACLU I* with its established free speech jurisprudence. *See Buckhannon Bd. and Care Home, Inc. v. West Virginia Dep't of Health and Human Resources*, 121 S. Ct. 1835, 1841 (2001); *see id.* at 1849 (Scalia, J., concurring) (declining to "enshrin[e]" errors that appear in the Court's "misleading dicta").

B. Congress Undervalued Commercial Speech When It Enacted COPA

The lesson that Congress mistakenly drew from *ACLU I* is that government has a relatively free hand to restrict the speech of commercial entities. To the contrary, this Court has explained that commercial speech receives substantial constitutional protection, as a "particular consumer's interest in the free flow of commercial information . . . may be as keen, if not keener by far, than his interest in the day's most urgent political debate." *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 763 (1976). Moreover, a restriction on commercial speech cannot be justified by a "bare assertion" that such speech is of "low value." *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 428 (1993).

Based on its misunderstanding of *ACLU I*, and its undervaluing of commercial speech, Congress drafted

COPA so that it would apply only to persons who make communications for "commercial purposes." 47 U.S.C. § 231(1) (Supp. IV 1998). More specifically, COPA's speech restrictions apply only to persons who make the prohibited communications "with the objective of earning a profit as a result of such activities." § 231(e)(2)(B). In contrast, COPA does not restrict at all the ability of noncommercial entities or individuals to post materials harmful to minors on the Web.

COPA's discrimination between two categories of protected speech cannot be justified under this Court's precedents. It makes no difference that the category of speakers against whom Congress is discriminating – those who engage in speech for "commercial purposes" – includes persons engaged in commercial speech, a type of speech that does not receive full First Amendment protection under the Court's current jurisprudence. Indeed, the precedent that provides the clearest guidance on this issue involved a speech restriction that discriminatorily burdened commercial speech but not noncommercial speech.

That decision is *City of Cincinnati v. Discovery Network, Inc.* The ordinance at issue in *Discovery Network* banned newsracks dispensing commercial handbills in order to advance governmental interests in safety and esthetics, but did not affect newsracks dispensing noncommercial materials. The Court invalidated the ordinance in language that applies equally here:

> The major premise supporting the city's argument is the proposition that commercial speech has only a low value. Based on that premise, the city contends that the fact that assertedly more

> valuable publications are allowed to use newsracks does not undermine its judgment that its esthetic and safety interests are stronger than the interest in allowing commercial speakers to have similar access to the reading public.
>
> We cannot agree. In our view, the city's argument attaches more importance to the distinction between commercial and noncommercial speech than our cases warrant and seriously underestimates the value of commercial speech.

507 U.S. at 418-19.

Like the Cincinnati City Council, Congress apparently assumed that commercial speech is of low value and may be easily restricted. That assumption was flawed when this Court decided *Discovery Network* in 1993, and is even more clearly incorrect under the Court's more recent commercial speech decisions. Those decisions have raised the value of commercial speech in the First Amendment hierarchy, so that discrimination against commercial speech, based solely on an argument that it is of low value, cannot possibly be justified today.

Since *Discovery Network* was decided in 1993, the Court has clarified and thereby strengthened the First Amendment's protection of commercial speech. For example, in *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484 (1996), the Court expressly overruled an earlier decision that some understood as requiring courts to defer to legislatures that restricted commercial speech. That earlier decision, *Posadas de Puerto Rico Associates v. Tourism Company of Puerto Rico*, 478 U.S. 328 (1986), was described in *44 Liquormart* as "erroneously perform[ing] the First

Amendment analysis," 517 U.S. at 509 (Stevens, J., principal opinion), and as having been replaced by a "more searching[ ]" examination of commercial speech restrictions, *id.* at 531 (O'Connor, J., concurring).

Further, in 1999, the Court raised the possibility that the *Central Hudson* test used for reviewing restrictions on commercial speech should be replaced with a "more stringent" test, recognizing that various legal thinkers, including "reasonable" judges, have adopted that position. *Greater New Orleans*, 527 U.S. at 184; *see Lorillard Tobacco Co. v. Reilly*, 121 S. Ct. 2404, 2430 (2001) (Kennedy, J., concurring) (expressing a "continuing concern[ ] that the [*Central Hudson*] test gives insufficient protection to truthful, nonmisleading commercial speech"); *id.* at 2431 (Thomas, J., concurring) (stating that "when the government seeks to restrict truthful speech in order to suppress the ideas it conveys, strict scrutiny is appropriate, whether or not the speech in question may be characterized as 'commercial' "). Particularly in light of this Court's recent strengthening of commercial speech protection, Congress was mistaken in believing that it could fix the CDA by making it applicable only to the speech of commercial entities.

In short, government may not discriminate against commercial speakers (and their adult audiences) based on a misguided notion that their speech is of low constitutional value. As the Court has stated, "[t]he inherent worth of the speech in terms of its capacity for informing the public does not depend upon the identity of its source, whether corporation, association, union, or individual." *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765,

777 (1978). The court of appeals properly held the government to a substantial burden of proof to justify its restriction on the valuable speech of commercial entities, and found that the burden had not been met.

C. Congress' Discrimination against Commercial Speakers Undermines Its Ability to Demonstrate the Effectiveness of COPA

COPA's disparate treatment of communications made for commercial and noncommercial purposes violates the Constitution for an additional reason. Speech restrictions cannot withstand First Amendment scrutiny if they are ineffective in achieving the government's asserted goal. COPA must be deemed ineffective in achieving its goal of protecting children from indecent materials available on the Web because (unlike the CDA) it excludes from its coverage the enormous amount of indecent speech published on the Web by noncommercial entities and by commercial entities located outside the United States.

As stated in *Discovery Network*, it is "impermissible" for government to enforce a speech restriction that distinguishes between commercial and noncommercial speech when "the distinction bears no relationship *whatsoever* to the particular interests that the [government] has asserted." 507 U.S. at 424 (emphasis in original). In *Discovery Network*, the challenged municipal ordinance, which prohibited newsracks containing commercial handbills, but permitted those containing noncommercial publications, could not be justified based on the city's asserted interests in esthetics and safety. All newsracks were "equally at fault," and, therefore, the city's partial

ban on newsracks could not satisfy the constitutional test of effectiveness. *Id.* at 426.

This same principle has been applied in cases involving inconsistent restrictions within the category of commercial speech. For example, in *Rubin v. Coors Brewing Co.*, 514 U.S. 476 (1995), the Court invalidated a federal law that, in the name of promoting temperance, prohibited the disclosure of alcohol content on beer labels, but permitted such disclosure on the labels of wine and spirits. The Court held that the challenged law could not be effective because of the "overall irrationality" of the regulatory scheme. *Id.* at 488.

Similarly, in *Greater New Orleans*, the Court struck down a ban on broadcast advertising for casinos, ostensibly designed to reduce demand for casino gambling, that contained an exemption for casinos owned by Native Americans. The Court stated, "the regulation distinguishes among the indistinct, permitting a variety of speech that poses the same risks the Government purports to fear. . . . " *Id.* at 195; *see also Carey v. Brown*, 447 U.S. 455, 465 (1980) (holding that New York's interest in residential privacy could not sustain its statute permitting labor picketing, but prohibiting nonlabor picketing, when nothing in that content-based distinction had any bearing on privacy).

Like the speech restrictions challenged in *Discovery Network*, *Coors Brewing*, and *Greater New Orleans*, COPA distinguishes among the indistinct. While COPA restricts indecent communications made on the Web by commercial entities located in the United States, it has no impact on children's access to indecent materials posted on the

Web by noncommercial entities or by commercial entities located outside the United States. The government has not made any attempt to show how COPA could be effective in light of its inconsistent treatment of communications that, presumably, are equally, if not more, harmful to children.

The legislative history of COPA actually supports the conclusion that the government could not make the necessary showing of effectiveness. For example, in order to prove that COPA would be effective, the government would have to show that a substantial portion, if not the majority, of indecent materials on the Web are posted by commercial entities located in the United States. But the House Report admits that "no reliable statistics exist on the world-wide distribution of pornography over the Internet." H.R. Rep. No. 105-775, at 20. Without such statistics, the government cannot satisfy its burden to prove the effectiveness of COPA.

Further, the government could not justify COPA unless the indecent materials posted on the Web by noncommercial entities are either small in quantity or significantly less harmful to youth than materials posted by commercial entities. Again, however, the House Report cuts against the constitutionality of COPA. The Report states that "a large quantity of information" harmful to minors "will still be available" on noncommercial sites on the Web and on the Internet. *Id.* at 13. Thus, the legislative history of COPA constitutes an admission that the government has no idea what percentage of materials inappropriate for minors will be eliminated by COPA, or

whether the eliminated materials are more (or less) harmful than the materials that will continue to be available on the Web and the Internet.

In sum, the government cannot satisfy its constitutional burden to prove that COPA would be effective. Just as in *Discovery Network*, the government has failed to show that the amount of allegedly harmful speech to be eliminated by COPA would be substantial enough to materially advance the asserted governmental goal. 507 U.S. at 418. Also as in *Discovery Network*, the government has not demonstrated a basis for COPA's distinction between speech by commercial and noncommercial entities that is relevant to its asserted interest. *Id.* at 428. For this additional reason, COPA cannot withstand scrutiny under the First Amendment.

II. THE GOVERNMENT MISTAKENLY ARGUES THAT THE FIRST AMENDMENT APPLIES WITH LESS FORCE WHEN THE ASSERTED JUSTIFICATION FOR CENSORSHIP IS THE PROTECTION OF CHILDREN

The government seeks to reduce the judicial scrutiny applied to COPA based not only on the nature of the speakers whom it restricts (*i.e.*, commercial entities), but also based on the nature of the governmental interest that COPA purportedly serves. In the government's mistaken view, the First Amendment should be applied less strictly here because the asserted legislative purpose for COPA is the protection of children. Pet. Br. at 48-49. According to the government, any burden that COPA imposes on speech must be balanced against its "compelling interest in protecting children from pornographic material that is

harmful to them, even if the material is not obscene by adult standards." *Id.* at 48.

This is not the first case, nor likely will it be the last, that presents a conflict between First Amendment rights and a government's claim that it must restrict those rights in order to protect children. Prof. Catherine J. Ross has explained, in a passage quoted by the court of appeals, why legislatures continually adopt such speech restrictions: " 'When sensitive matters of freedom of speech collide with images of children's vulnerability, and are framed in terms of the battle between good and evil, even well intentioned people can lose sight of fundamental constitutional principles.' " *Ashcroft v. American Civil Liberties Union*, No. 00-1293, *petition for cert.*, app. ("Pet. app."), at 38a n.25 (quoting Catherine J. Ross, *Anything Goes: Examining the State's Interest in Protecting Children from Controversial Speech*, 53 Vand. L. Rev. 427, 521 (2000)).

In contemporary society, where adults and minors are often exposed to the same media, it is increasingly difficult to keep communications away from children without simultaneously restricting the rights of adults to communicate with one another. But this conflict between competing interests is not a new problem for the Court. In a line of cases decided during the past 44 years, the Court consistently has resolved the conflict in favor of protecting speech.

In *Butler v. Michigan*, 352 U.S. 380 (1957), the Court invalidated Michigan's prohibition on the sale of materials "tending to incite minors to violent or depraved or immoral acts, [or] manifestly tending to the corruption of the morals of youth. . . . " 352 U.S. at 381. The Court held

that the challenged law impermissibly "reduce[d] the adult population of Michigan to reading only what is fit for children." *Id.* at 383. It added, "[s]urely, this is to burn the house to roast the pig." *Id.*

In *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60 (1983), the Court relied on *Butler* to strike down as unconstitutional a federal statute that prohibited the mailing of unsolicited advertisements for contraceptives. 463 U.S. at 73-74. Noting that the unsolicited advertisements were "entirely suitable for adults," the Court invalidated the statute as an impermissible restriction on commercial speech. *Id.*

This principle again was applied to a restriction on indecent speech in *Sable Communications of California, Inc. v. Federal Communications Commission*, 492 U.S. 115 (1989). At issue was a federal ban on, *inter alia*, indecent commercial telephone messages, commonly known as "dial-a-porn." After recognizing the government's compelling interest in protecting children, the Court made plain that this interest cannot diminish the free speech rights of adults. 492 U.S. at 126. In reliance on *Butler* and *Bolger*, the Court invalidated the ban because it "has the invalid effect of limiting the content of adult telephone conversations to that which is suitable for children to hear." *Id.* at 131.

The most pertinent application of this general principle appears in *ACLU I*. There, the Court struck down the CDA, which was the predecessor statute to COPA and purportedly was designed to serve the same governmental interest in protecting children from indecent speech. In language equally applicable here, the Court

explained that "the governmental interest in protecting children from harmful materials . . . does not justify an unnecessarily broad suppression of speech addressed to adults." *ACLU I*, 521 U.S. at 875 (citations omitted).

Most recently, in *Lorillard*, the Court struck down restrictions on tobacco advertising that Massachusetts claimed were necessary to protect children. The Court recognized that government has a compelling interest in preventing underage tobacco use, but explained that the strength of that interest could not reduce government's constitutional burden to prove that its speech restriction was narrowly tailored. *Id.* at 2427.

The line of cases rejecting a "child protection" exception to the First Amendment stretches from *Butler* in 1957 to *Lorillard* in 2001. This principle of constitutional law is now so firmly established that it should be virtually impervious to challenge. *See also United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803, 815 (2000) (striking down federal law intended to shield children from seeing indecent images on cable television because the restrictions impermissibly burdened communications with adults); *Denver Area Educ. Telecomm. Consortium, Inc. v. FCC*, 518 U.S. 727, 759 (1996) (citations omitted) (noting that "[n]o provision, we concede, short of an absolute ban, can offer certain protection against assault by a determined child," and affirming that the Court has "not, however, generally allowed this fact alone to justify reduc[ing] the adult population . . . to . . . only what is fit for children."); *id.* at 759 (Kennedy & Ginsburg, J.J., concurring in part and dissenting in part) (same).

The government cannot avoid the rule of *Butler* and its progeny by relying (as it did in *ACLU I*) on this Court's inapposite decision in *Ginsberg*. In *Ginsberg*, the defendant owner of a stationery store who sold an indecent magazine to a 16-year-old boy did not suggest that New York's ban on such sales to youths under the age of 17 affected his ability to sell to adults, and clearly it did not. *Id.* at 634. Thus, *Ginsberg* was concerned solely with New York's exercise of its police power to protect minors under 17, not as here, a conflict between that police power and the First Amendment rights of adults. The criminal statute in *Ginsberg* could be and was upheld based on mere rational basis review. *Id.* at 643.

In contrast to the criminal statute at issue in *Ginsberg*, COPA does impede constitutionally protected communications among adults. Whereas an adult does not need to pay an entrance fee at the door of a stationery store if he wishes to browse for adult magazines, COPA contemplates such an entrance fee for an adult who wishes to browse the Web for adult materials.

More specifically, the government focuses on a service called Adult Check, which would provide an Adult ID to a consumer at a price of $16.95 per year. Pet. Br. at 48. Under COPA's affirmative defenses, a commercial Web site operator who posts indecent materials could avoid liability by requiring visitors to present an Adult ID before viewing the site's indecent materials. But the imposition of such an entrance fee would impede impermissibly communications among adults. Indeed, the government itself concedes that some adults will be "deterred from obtaining an Adult ID." Pet. Br. at 48.

Butler and its progeny prohibit such an abridgment on adult-to-adult speech.

On a related point, government's asserted interest in protecting children from indecent speech cannot withstand scrutiny when a less speech-restrictive alternative is available, and government has not shown that alternative to be ineffective. *Playboy Entertainment Group*, 529 U.S. at 816. Here, the district court found that such an alternative exists: "blocking or filtering technology may be at least as successful as COPA would be in restricting minors' access to harmful material online without imposing the burden on constitutionally protected speech that COPA imposes on adult users or Web site operators." Pet. app. at 94a. Apart from the First Amendment, there is another reason why blocking or filtering technology is preferred over governmental regulation. Such technology allows parents, rather than government, to decide whether to allow their children, including those as old as 16, unrestricted access to indecent speech. It is a "fundamental right" of parents to make such decisions concerning the upbringing of their children. *See Troxel v. Granville*, 530 U.S. 57, 66 (2000).

The Court's admonition in *Butler* against burning down the house to roast the pig applies with special vigor when the "house" in question is the Internet. This newly-constructed medium, although private, is open to all Americans. Once a speaker enters the Internet, he or she will find a vast interactive community. The district court found in 1999 that approximately 70.2 million people of all ages use the Internet in the United States alone. Pet. app. at 56a. The pervasiveness and accessibility of a

medium such as the Internet, characteristics that the government identifies as supporting greater censorship, in fact justify rigorous First Amendment protection. *See id.* The constitutional rights of adults to communicate with one another must be especially free in those media that allow for the most effective communications.

CONCLUSION

The judgment of the court of appeals should be affirmed, either on the ground relied on by that court, or, as discussed in this brief, because COPA impermissibly undervalues commercial speech and would be ineffective in achieving the government's asserted goal.

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